Nos. 14501-14515

United States
Court of Appeals
for the Ninth Circuit.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, Receiver,

Sup. Vol. 7899

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Appellees.

Transcript of Record
In Two Volumes
Volume II
(Pages 91 to 156)

Appeals from the United States District Court, Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-24-54

The United States District Court, Northern District of California, Southern Division

Nos. 33514 and 26591-S

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor,

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I. DuPONT BAYARD, Receiver,

Plaintiffs,

vs.

WESTERN PACIFIC RAILROAD COMPANY, JAMES FOUNDATION OF NEW YORK, INC., and WESTERN REALTY COMPANY,

Defendants.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiffs:

LEROY R. GOODRICH, ESQ.,
FRANK C. NICODEMUS, JR., ESQ.,
WILLIAM MARVEL, ESQ.

For the Defendants:

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE, by
ALLAN P. MATTHEW, ESQ.,
JAMES D. ADAMS, ESQ.

Friday, June 11, 1954—10:00 A.M.

The Clerk: In the matter of the Western Pacific Railroad Company, Order to Show Cause in Re Contempt, and Motion for Summary Judgment.

The Court: Which matter do you wish to take up first, or do you wish to take them up together?

Mr. Matthew: If agreeable to your Honor, I think we might take them up together because they are related and I think the argument as to one may naturally apply simultaneously.

Mr. Goodrich: I agree, your Honor.

The Court: Who wishes to proceed? Are you going to proceed?

Mr. Goodrich: I will, your Honor, if you wish.

The Court: All right.

Mr. Goodrich: As I think your Honor knows, there are four matters which in fact are before this Court this morning for argument and, as Mr. Matthew has already said, they are four interrelated matters. In the order of their filing, they are these:

First, a Civil Action No. 33514, which is a complaint in equity filed by the Western Pacific Railroad Corporation and by Alexis I. DuPont Bayard, Receiver, for the purpose of implementing the Decision of the Court of Appeals in this [2*] Circuit as that Decision was determined in the Decision by Judge Byrne. This was the Decision which finally ended the action which was brought in 1946 by the plaintiff in this matter with respect to the tax matters that were before this Court.

Second, there is a petition before this Court filed

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

in May of this year under the old Bankruptcy Proceeding 26591-S, seeking an order of the Court directing the plaintiffs in the first action that I referred to, to show cause why they should not be found guilty of contempt of court by reason of the filing of this recent action.

Third, there is a motion filed by the Western Pacific Railroad Company for summary judgment on the pleadings that are now before the Court in this Action No. 33514, and a similar motion for summary judgment in its favor filed subsequently by the Railroad Corporation.

Now, your Honor, each of these matters, it seems to us, really presents a single primary question, upon the answer to which your Honor's action with respect to each of them, we think, must hinge, and I would phrase that question as being simply this:

Did or did not the Decision in Civil Action 26508 by the Court of Appeals create and depose upon the Western Pacific Railroad Company a trust liability to the unpaid creditors of the old operating company with respect to the taxes remitted [3] on account of the parent company's loss and the use of the parent company's tax credit?

Your Honor went through the long process of litigation here and is familiar with the fact that these four matters are not only interrelated but each of them harps back to and is reminiscent of questions that were raised by and during the trial by this Court and the subsequent appeal of Action 26508 which was brought by Western Pacific Railroad Corporation in 1946. That arose out of the

filing of the income tax returns, joint returns, in which the total loss of the Railroad Corporation or of its interest as the sole stockholder of the Railroad Company and its tax credit for that loss was used by the Railroad Company to effect what this Court called "an escape of taxes" which otherwise it would have had to pay in a sum exceeding seventeen million dollars.

In that action the Railroad Corporation appeared as the stockholder and the parent company in whose name the returns were made and as the owner of the tax credits which had inured—been created by its tremendous loss. That litigation, your Honor, ended at the close of 1953 with the denial of review by the Supreme Court and that denial had the effect, of course, of confirming and upholding the judgment of the Court of Appeals and of this Court. The judgment of the Court of Appeals is expressed in the opinion of the majority written by Judge Byrne. [4]

Now, may I turn to that judgment and call the Court's attention to the portion of it which we have set forth in our petition here?

Mr. Matthew: If counsel will pardon me, might I hand to the Clerk, for the Court, some papers to which reference may be made and I think that will be of aid to Mr. Goodrich?

Mr. Goodrich: Certainly.

Mr. Matthew: Pardon me (submitting documents to Clerk).

Mr. Goodrich: Thank you, Mr. Matthew.

The Court: Go right ahead.

Mr. Goodrich: I am reading just briefly now from the Decision made by Judge Byrne. That Decision says:

"The Corporation was the sole owner of the subsidiary's capital stock. As such it was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities."

The Judge cited there Consolidated Rock Co. versus Du Bois, 312 U. S. 510, 522; and then goes on:

"It owed a duty not to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. * * * If Corporation had required tribute as a condition of its co-operation, then it would have been acting with less than the required standard of fairness to the [5] subsidiary's creditors."

That is the ground of the Decision reached by the Court at that time.

I might say, your Honor, that I find that in the trial in this Court the same idea apparently occurred to your Honor because in the Decision in the District Court here, your Honor, after speaking of the proposal for the plaintiff in that action to share in what your Honor called "the earnings of the debtor during the period of reorganization," you said:

"* * * there is some merit to defendant's contention that a firm obligation rested upon plaintiff to conform and co-operate to the end that the creditors and new owners should be benefited to the fullest."

In short, in the course of the trial before the District Court the defendant here made the very contention that is expressed in the opinion of Judge Byrne in the Decision in the Court of Appeals.

Now we have to ask ourselves then, what is the meaning of this Decision in the Court of Appeals? What do these words mean?

Certainly they are words that cannot be taken in any other sense than they appear as a matter of common useage in common language, as a matter of common sense to mean. It would appear to be clear that the Decision says, first, this: [6] that as the parent corporation, the Western Pacific Railroad Corporation, was under a fiduciary duty to make its tax credits available to the Railroad Company because the subsidiary corporation had unpaid creditors, it could not, the Court seems to say, it could not in good conscience refuse the use of these tax credits so long as there remained creditors of the subsidiary whose claims were unpaid or only partially paid.

In other words, we—by "we," I mean the plaintiff in this action—we had to make these tax savings possible and available to the operating company, says the Court, for the benefit of these unpaid or partially paid creditors.

Now is there any other meaning that could possibly be attached to those words? It seems to me not.

The Court will perhaps remember, as I said, the same idea crept into the trial of the action here and is reflected in your Honor's comment in the Decision here in the District Court.

If the Decision by Judge Byrne means what it says, then, it seems to us, your Honor, that two consequences immediately flow from that Decision.

First, that the monies thus placed in the hands of the Railroad Company by the use of the tax credits of the parent corporation constitute a trust fund which it must devote to the payment, as far as possible, of the obligations that it still owes to the three junior creditors whose claims were [7] unsatisfied or only partially satisfied out of the assets of the Railroad Company as they stood in 1939. Those creditors were the A. C. James Company, the Western Realty Company, the Western Pacific Railroad Corporation, and in this action before the Court we have named the A. C. James Company, Western Realty Company, defendants, simply to give them an opportunity to come into Court if they desire and because all claims, if our theory of this Decision is correct, stand upon the same basis.

I think we have set forth in the complaint the extent to which the claims of these three creditors were not paid in full in the original bankruptcy proceeding. The net result is that the A. C. James Company received something like $3,600,000 less than the full amount of its claim. The Western Realty Company had a claim of only $60,000 and they received nothing, and, as a matter of fact, I represented them in the bankruptcy proceeding on that claim, and the Western Pacific Railroad Corporation, in addition to the complete loss of its stock, lost over $7,000,000 in money that it had loaned to

the operating company and further loss from accommodation collateral that it had put up to secure obligations of the operating company.

All of this means, it seems to us, your Honor, that if the parent corporation was under a duty to create these savings by the use of its tax credits for the Railroad Company for the benefit of its creditors, then the Railroad Company is under a [8] like duty to use these monies saved for the benefit of those creditors.

Second, it seems clear that this Decision means that the obligation to satisfy the claims out of this fund of these unpaid or partially paid creditors is a new obligation undertaken as a matter of law and of equity by the Railroad Company upon its acceptance of the benefits of those tax savings conferred upon it by the parent corporation.

If Judge Byrne's position is sound, and it remained undisturbed on appeal, if the parent corporation was obliged as a fiduciary to provide these savings by the use of its tax credits, then the Railroad Company must in our judgment be in a like fiduciary position with respect to these creditors. Surely it cannot be as a matter of equity, your Honor, that it can accept these monies upon the ground that it has creditors and, then having accepted them, blithely decline to use them for the very purpose which Judge Byrne says compelled the parent to lend its aid to effect these savings.

The Court: What was finally decided, however, in the reorganization proceeding that the Western Pacific Corporation was not entitled to participate

in the earnings of the defendant Railroad Company during the reorganization period in Ecker against the Western Pacific.

Mr. Goodrich: Yes, your Honor, that is right, in the current operating earnings of the company. I think that is [9] correct.

The Court: What you ask for, if granted, wouldn't that be a violation of that Decision of the Supreme Court?

Mr. Goodrich: I think not, your Honor. This is a different thing altogether. These were not earnings. These were savings that were produced——

The Court: The defendant Railroad Company was the one that had to pay taxes and it had to pay taxes to the United States out of its earnings.

Mr. Goodrich: No, it paid taxes out of its gross revenues, your Honor. There is some difference between earnings and gross revenues.

The Court: Well, it had to pay taxes upon the accepted theory——

Mr. Goodrich: That's right——

The Court: ——that it had revenues which under the tax laws it had to pay taxes on.

Mr. Goodrich: On the assumption that it paid the taxes and that they had subsequently—the Government had decided that this tax claim, the claim for exemption, was good and had remitted the taxes, if it had remitted those taxes and repaid the seventeen million dollars, if it had in fact been paid to the Government and then was returned to the Railroad Corporation, as the Railroad Corporation claimed in the initial proceeding that it should be,

Judge Byrne's Decision [10] says that we would have then been under an obligation to restore that seventeen million dollars to the Railroad Company for the benefit of its creditors.

The Court: I don't quite follow you on that. Would you mind repeating that?

Mr. Goodrich: Judge Byrne's Decision says, doesn't it, that we must make our tax credit available to the Railroad Company for the benefit of its creditors? So, if the tax had wholly been paid, the entire twenty-one million dollars had been paid, and the claim made for refund of this seventeen million dollars, and the seventeen million dollars had been paid back to the Western Pacific Railroad Corporation as the taxpayer who put in the statements, the income tax statements, Judge Byrne's Decision, in our judgment, says that we would then have been obliged to turn over that seventeen million dollars to the Railroad Company because it had unpaid creditors.

The Court: Turn it over to the Railroad Company?

Mr. Goodrich: I would think so. It says that we had to make our tax credits available. Let me get (referring to memorandum)—I think I have here the entire citation:

"The Corporation was the sole owner of the subsidiary's capital stock. As such it was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities. * * * It owed a duty [11] not

to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. * * * If Corporation had required tribute as a condition of its co-operation, then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

Well, if that doesn't mean that we either have to give the tax credits to the Railroad Company to get an exemption from taxes or asking for the exemption, restore that money to the Railroad Company if it had been paid in by them to the Government, when the Government made the settlement with us, I don't know what it means. It seems perfectly clear that what the Court is here saying is that because we were the parent corporation and under a fiduciary duty to do nothing that would be injurious to the subsidiary corporation, that we were required to use these tax credits that we had by making them available, however they might be made available, to the subsidiary corporation because it had unpaid creditors; and, if that is so, then it seems to us perfectly clear that——

The Court: Where do you get the idea that it had to do that because it had unpaid creditors?

Mr. Goodrich: That is what the Judge says. The Judge says that they are entitled to the money. [12]

The Court: That who is entitled to the money?

Mr. Goodrich: The Railroad Company.

Let me go back here.

He says we could not bargain in this matter at all. He says:

"As the subsidiary's parent company, the Cor-

poration was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities. * * * It owed a duty not to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty. * * * If the Corporation had required tribute as a condition of its co-operation, then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

The Court: Of course, that isn't just exactly what you said.

Mr. Goodrich: Well, I don't know how we could accomplish the end result that is indicated by this Decision, except either to make the tax credit available, never have paid the tax at all and set up this claim, or else if in fact the seventeen million dollars had been paid, ask for a refund, and on the same agreement with the Government that was made, get the refund and restore it to the hands of the Railroad [13] Company.

The Court: Suppose that the situation were as you hypothecated a moment ago, that the full tax was paid by the defendant company, and then on the basis of subsequent consolidated returns filed, a refund was asked for and was granted and the tax money that had been paid got into the treasury of the defendant company——

Mr. Goodrich: Then, if I understand it——

The Court: ——then would you think that under any language of the decisions of the Court the corporation would be entitled to get that money?

Mr. Goodrich: Of course, your Honor, that wasn't what was done. But what Judge Byrne says plainly is that the tax credit that we had as the result of our loss must be made available to the operating company for the benefit of its unpaid creditors.

The Court: Of course, that was one of the reasons given by the Court why it could not be claimed that there was any, of course, relationship between the corporation and the defendant which would enter into the determination of the questions as to whether or not the consolidated returns would be filed. Do you think it follows from that, that because there was that duty, that the result would be that when the recovery was made that—or, rather, when the tax saving was made that the tax saving should be turned over to the [14] plaintiff?

Mr. Goodrich: I could read no other meaning to Judge Byrne's statement.

The Court: He doesn't say that, because the case was decided against the plaintiff.

Mr. Goodrich: That's right.

The Court: He only said that would be the result.

Mr. Goodrich: That's correct, your Honor. But in that case the plaintiff was appearing as the stockholder and as the owner of the credit.

In this case now we accept the Decision of Judge Byrne, we accept the Decision that was finally confirmed and terminated in the case.

We now are in the position, the Western Pacific Railroad Corporation occupied two positions in all

of the history of this case; one was that it was the stockholder, it was the sole owner of the stock of the bankrupt corporation——

The Court: And the reorganization court determined that to be valueless.

Mr. Goodrich: That the stock was valueless. But it was also pointed out a creditor, and a not inconsiderable creditor because there was owing to the Railroad Corporation in accordance with the claim presented in the bankruptcy proceeding more than seven million dollars and that has never been paid, the still creditor—— [15]

The Court: Is this suit that you are bringing now in the nature of a suit on behalf of the creditors to participate in this matter, because of the fact that there is no other relief or could be none in the reorganization proceeding and that now the creditors feel that they should have a further participation in the earnings of the defendant company?

Mr. Goodrich: No, your Honor. What we think is that the Decision of Judge Byrne's, the Decision that Judge Byrne makes, is simply that this fund —that we were obligated to remit the consolidated returns, the use of our loss for the purpose of getting a tax credit, with the Federal Government, the use of that tax credit, so that the Railroad Company might possess this seventeen million dollars which your Honor labeled "a tax escape"—I think perhaps rightly—in the original proceedings in this Court.

The Court: They didn't think much of that.

Mr. Goodrich: And said we must do so because the company had unpaid creditors.

The Court: What I am trying to find out, Mr. Goodrich, is this, that I don't see how there would be the slightest merit to the suit. As a matter of fact, I would be inclined to think it would be a vexatious suit if all it was was a suit just brought by the same person against—and whose claim has been decided adversely. No matter what theory you are bringing it under, the case was in Court and the Western [16] Pacific Railroad Corporation was denied relief and the case was decided against it. And if you are now trying to use some of the language in the opinions as to some of the reasons given for that judgment as the basis for bringing another suit on the same subject matter, why then I would think there couldn't possibly be the slightest merit to it.

I am just wondering whether or not what your theory is, is that the creditors of the Western Pacific Railroad Company are bringing some sort of an action in equity because of the fact they haven't got any other way of getting relief which they might now be entitled to as creditors because of the fact that the reorganization proceeding having finally disposed of all those matters is the final ending of the matter and that upon some new theory the creditors, after all that has happened, are now in a position and think that there is something they can now assert because some reason is given for the decision by some of the judges in their opinions in the matter.

I would take it that is not your position. I mean, at least I am not sure. But I have read the complaint and it does not seem to be the position of the plaintiff.

Mr. Goodrich: Well——

The Court: This is solely a suit, isn't it, by the Western Pacific Railroad Corporation on its own behalf to get——

Mr. Goodrich: And for the benefit of the other creditors. [17]

The Court: Does it say that?

Mr. Goodrich: We have stated that, that we made them defendants in this action for that purpose to bring them herein.

The Court: These are the only other creditors?

Mr. Goodrich: There are——

The Court: The only creditors, the original creditors of the Western Pacific Railroad Company in the reorganization—at the time of the reorganization?

Mr. Goodrich: They are not the only other creditors. They are the only other creditors whose claims were not satisfied in full by the Plan of Reorganization. The A. C. James Company claim was satisfied in part but not in full. The claim of the Western Realty Company was not satisfied to any extent; nor was the claim, of course, of the Western Pacific Railroad Corporation. [18]

Now, if our understanding of this Decision is correct, that we were obligated to make these tax credits available to the company in order that these tax savings might be effected because it had credi-

tors, as Judge Byrne puts it, then it seems to us that those tax savings, having been saved by the use of these tax credits which the parent company had to turn over to the Company, constituted a trust fund for the benefit of these unpaid creditors.

The Court: What you are saying is that there are some earnings of the Western Pacific Railroad Company that have somehow or other become a trust fund for the Western Pacific Railroad Corporation and the James Foundation and the Western Realty Company?

Mr. Goodrich: Well, that is it, that is what we feel is the purport; that is why we are here in Court, to ask this Court whether that is not what this Decision really says.

The Court: How can you get around the final decision in the reorganization proceeding, that you are not entitled to participate? The Court didn't make any distinction on it. You just weren't entitled to participate in those earnings.

Mr. Goodrich: As the stockholder and as the owner of the loss that we were not entitled to participate. But there was no question raised in those proceedings at all about the fate of these unpaid creditors or their right to participate in these savings if they were made or until the decision of [19] Judge Byrne, the duty of the Railroad Corporation——

The Court: What was the amount of the Western Pacific Railroad Corporation's claim as a creditor?

Mr. Goodrich: What was the amount of it?

The Court: Yes. Do you happen to know that, aside from its claim as a stockholder?

Mr. Goodrich: The Western Pacific Corporation claim as a creditor unpaid was $7,609,370, set forth in our complaint.

The Court: Well, then, what you are saying is that $7,000,000 of the earnings of the Western Pacific Company should go to the Western Pacific Railroad Corporation?

Mr. Goodrich: And there was, I think, a total of $6,249,750 to A. C. James Company, but the unliquidated balance that we have set forth in the complaint here is $3,683,175.

Those are the correct figures, I think.

Mr. Nicodemus: I think so, yes.

Mr. Goodrich: Here were three creditors whose claims had not been paid in full. True, they could not be under the reorganization proceeding because of the valuation found on the Railroad properties for the Railroad Company itself. There was not enough available to satisfy all of the creditors, and the bondholders were first paid off under the Plan proposed by the Interstate Commerce Commission.

Next, the Reconstruction Finance Corporation was paid under [20] a similar plan—under the same plan. Next, the Railroad Credit Corporation was paid. Finally, the A. C. James Company, the fourth creditor in line, was paid in part but not in full. The Western Realty Company, the fifth in line, with its small claim of $60,000, was paid nothing. And there was nothing left for the Western Pacific Railroad Corporation as the stockholder nor on account

of its claim for monies advanced to and for the Railroad Company prior to the institution of the bankruptcy proceedings.

Here were left three creditors whose claims had been unpaid and we can read no meaning into the language of the Decision except that this Corporation was under a fiduciary duty to make its tax credits available to the Railroad Company, and it performed that duty. The tax credits were used for the purpose of saving this total amount of seventeen million dollars, which in fact was done.

If the duty arose from the fact that there were unpaid creditors, then it seems to us that these unpaid creditors now have under the new obligation imposed on the Company by this Decision the right to come into Court and ask this Court whether the Decision of Judge Byrne means actually what it says, whether there is now created this trust liability upon the Railroad Company, and that's all.

The Court: But the opinion, the judgment of the Court, specifically in the Court of Appeals, to the effect that the [21] benefit of the tax saving could not and should not inure to the benefit of the Western Pacific Railroad Corporation. It says so in so many words.

Mr. Goodrich: That's right, as the stockholder, your Honor. But we are not appearing here as a stockholder. We recognize that Decision. As a stockholder the Western Pacific Corporation would have no position in this Court whatever. Our stock interest was wiped out. We lost it completely, $75,000,000 loss. But we were still a creditor. A stock-

holder of a corporation might lose all of its stock in the corporation——

The Court: Are you any different——

Mr. Goodrich: ——but is still a creditor.

The Court: Are you any different than any other creditor whose interests are finally determined in a reorganization proceeding? Let's assume that you haven't got this long drawn out litigation that we had here and you are just a creditor of the Western Pacific Corporation today—and the Western Pacific Railroad Company today—and you look back over the records and you find something that some judge said about it in some litigation, and the reorganization proceeding has been fully closed and concluded and everybody's rights determined. Do you think a creditor can come in and file a suit against the reorganized company? What would be the basis for that? There never would be an end to litigation [22] if that were so.

I don't care what the theory is. If you are a creditor, as you were, then are you in any different position than any other creditor in the case of a reorganization proceeding that has been finally closed and concluded and run the gamut of all of the courts, finally ended, and you haven't got your claim satisfied?

Now you come in as a creditor and again litigate the matter by filing some kind of a suit because somebody else thought they had a claim against the corporation on another theory and were defeated in that claim, and some place in that Decision some judge made some comment of some kind in connec-

tion with the arguments or the basis of the Decision on the subject matter.

He wasn't considering there the question of whether a creditor could come in and file a suit again in the future in this closed transaction. So, are you in any different position than any other creditor in the case of a reorganization proceeding? Isn't that so?

Well, what rights do you have as a—suppose you were, instead of being the Western Pacific Railroad Corporation, you were John Smith who had a claim for personal injuries against the Railroad Company in the sum of $25,000 and he got wiped out in the reorganization proceeding and it was all ended, and John Smith being of an inquiring turn of mind [23] and having some interest in legal proceedings, read the Decisions of Judge Goodman and Judge Byrne and all the rest of them in this proceeding, and he said to himself: Well, now, maybe I can come along and get my claim satisfied now in this case because I have discovered that the judge said something about a trust fund there in this other litigation, and they got some tax savings there that benefited them, increased their earnings, or by which their earnings were increased, so I am going to come along now and ask the Court to satisfy my claim of $25,000 out of these earnings, because of the opinion in the case. Something was said in the opinions in this other piece of litigation that went on.

I mean, I don't think your position, Western Pacific Railroad Corporation, because it is a Corporation, would be any different than Smith or

Jones or anybody else that had a claim against the Corporation. Would it? Would it be in any different position?

Mr. Goodrich: Yes.

The Court: You say that your claim is based solely upon your position as a creditor?

Mr. Goodrich: Well, isn't the answer to that that the only creditors who were involved at the end of that bankruptcy proceeding were the creditors who had filed their claims at the initiation of those proceedings? Any people who had claims against the Corporation during the period of the [24] operation of the Railroad by the trustees had their claims satisfied of course.

The Court: I am referring to a creditor that had a claim that was in existence at the time of the reorganization proceeding, when it started and who had a position as a creditor—not as a creditor during the course of operations under the reorganization, but an antecedent creditor, and he had a claim, and he held a note from the company, some kind of a credit. Now, could he come in now with this kind of a suit on the strength of this proceeding that was started by the Western Pacific Railroad Corporation to share in the so-called tax savings, which to me was always, has always been a misnomer in the case, but nevertheless that is the way they have always spoken of it, could he come in now because of this other kind of a proceeding which had nothing to do with the position as a creditor of the company and because of something that was said and which he interprets in a certain

way was said by some judge in that proceeding, could he come in and now reassert his claim as a creditor of the corporation, which has already been adjudicated, on some trust fund theory such as you have urged?

Mr. Goodrich: Well, now let's see when he became a creditor, your Honor. These three creditors were a part of a list of a total of seven, I think, the bondholder, the Reconstruction Finance Corporation, the Railroad Credit [25] Corporation, the A. C. James Company, the Western Realty Company, and the Western Pacific Railroad Corporation, were seven creditors in the bankruptcy proceedings.

The first four of those creditors had their claims paid. The A. C. James Company was paid in part and in part it was not. The Western Realty Company was not paid. The Western Pacific Railroad Corporation was not paid.

Now you are assuming an eighth creditor somewhere. He could not be a person who was a creditor at the initiation of those bankruptcy proceedings. He would have to be a creditor of the corporation whose claim against the corporation had begun in the period of the operation of the company under the jurisdiction of this Court and in the hands of the trustees and his claim would have been paid—it would be a legitimate claim.

The Court: That isn't what I mean.

Mr. Goodrich: How could you have another creditor?

The Court: I am not talking about somebody

whose claim might have to be a claim in the reorganization proceeding. The Western Pacific Railroad Corporation's claim, as I understand it, unless I am in error—you correct me on that—was a claim against the Railroad Company that antedated the reorganization proceedings.

Mr. Goodrich: That's right.

The Court: That's right. [26]

Mr. Goodrich: That's right.

The Court: So it doesn't make any difference who that creditor is, whether it is John Jones who has another kind of a claim or not. In principle, what you have to meet is whether or not an antecedent creditor of the—prior to reorganization—can now come in and file this kind of a suit because of something that was said by a court in a case that involved an entirely different question as between the holding company and its subsidiary corporation and had nothing to do with the claims of creditors who antedated the reorganization proceeding.

So let's forget—let's not call this a suit by the Western Pacific Railroad Corporation. Let's call this a suit by John Smith——

Mr. Goodrich: Yes.

The Court: ——to whom the Western Pacific Railroad Company owed money.

Mr. Goodrich: When?

The Court: Prior to the initiation of the reorganization proceedings.

Mr. Goodrich: And are we to assume then that John Smith filed a claim in the bankruptcy proceedings?

The Court: He filed a claim—The Western Pacific Railroad Corporation filed a claim, didn't it?

Mr. Goodrich: That's right. [27]

The Court: He filed a claim and it was not satisfied. And it was not satisfied when the reorganization was completed, and so he had an unsatisfied claim, and he was wiped out in the reorganization proceeding.

Now along comes—this is John Smith now—along comes the Western Pacific Railroad Corporation and it evolves this very novel claim that it ought to get this nineteen million or seventeen million in tax savings because of the so-called joint returns, consolidated returns.

And that litigation runs through all the gamuts of the court and the Western Pacific Railroad Corporation loses out on it.

Now, what benefit is that, what solace is that to Mr. John Smith who had a claim, how can he in any way advantage himself of anything in that litigation to now say that his claim was wiped out—John Smith's claim was wiped out in the reorganization proceeding—has now some sort of a new club to it and mysteriously by the language of some judge there has been established a trust fund and now John Smith can come in a suit and get his claim paid?

Mr. Goodrich: Well, your Honor, under that supposition, isn't John Smith simply another name for either the Western Realty Company or the A. C. James Company?

The Court: What I was trying to do—I won't

interrupt you any further—all I was trying to do was disassociate [28] the names from principle. That is all.

Mr. Goodrich: I see.

The Court: I was simply trying to paint a picture of whether or not there is any merit at all as a matter of law in the action that is filed here. In order to do that, we simply have forgotten the names and have simply taken Mr. Smith, who is a creditor, and see whether he could maintain this action.

Mr. Goodrich: Well, now——

The Court: That is what I had in mind.

Mr. Goodrich: All right. Perhaps I haven't made perfectly clear what we are seeking here. It is not, of course, the same thing as the claim that was involved in the preceding litigation where as a stockholder and as the owner of the tax credits we felt that the money saved belonged to the parent company.

That question is gone. That was decided against us. There is no doubt about that at all. But what we feel now is that under the language of this Decision this money in the hands of the Railroad Company, since we had to make it possible for the money to exist in the hands of the Railroad Company by a tax credit and a tax saving, is in the nature of a trust fund for the benefit of the creditors.

The A. C. James Company could be John Smith. The Western Realty Company could be John Smith. Or if they had [29] filed a similar petition, we then would be in a position, I suppose, of John Smith.

We are not claiming that this $17,000,000 belongs to the Western Pacific Railroad Corporation. We grant that under the Decision of the Court it does not belong to the Western Pacific Railroad Corporation as a stockholder and as the owner of that tax loss.

But Judge Byrne says we had to consent to the use of these tax credits by the operating company in order that the tax savings might be effected—tax saving which your Honor said—you couldn't even see that they were entitled to, that perhaps they really belonged to the United States Government.

Now they were made and they were made by the process of our giving the benefit of our tax credits to the operating company. We think, therefore, that if that is true, if that is why we gave the credits, if as a matter of law we were required to do it because there were unpaid creditors, then the creditors, not just the Western Pacific Railroad Corporation, the creditors, whoever they are that were unpaid, the very creditors that Judge Byrne was talking about—he was not talking about creditors whose claims arose during the bankruptcy proceedings, he was talking about the unpaid creditors whose claims were filed in the bankruptcy proceeding and whose claims predated 1939—he says we were obliged to make these credits available for the benefit of those [30] creditors, and we think that this fund should now properly be used exactly as Judge Byrne apparently expected that they would be used, for the benefit of those creditors.

It should be regarded as a trust fund and their claims be paid. [30-A]

The Court: The Circuit Court didn't have any power to make any order with respect to what would happen to the earnings of this corporation. All they decided was whether or not the defendant was entitled to recover in the action. They decided it was. There wasn't any reorganization court that was hearing the matter. There is no jurisdiction, of course, to determine what should be done with any of the earnings of the company. I don't see the point to that at all.

Mr. Goodrich: That is why we had to bring this action. We have got to find out what this decision means, what effect it has, if anything, on the creditors. Are these creditors or are they not entitled by reason of this decision on the new obligation? It is just as if, your Honor, one of these people, anybody—I make available to somebody some property that I have to help satisfy his obligations to somebody else. If I give him the money, he holds it as a trustee, and he is under obligation to pay it to the person for whom I intended. Now this money apparently was made available by the parent corporation because it was a fiduciary, Judge Byrne says, it had to be made available, he says, to the railroad company, because of the fiduciary relationship, because the railroad company had these unpaid creditors.

Well, then, if the creditors are the reason why the credit had to be turned over to the railroad company and the savings left with them, then they

must be the beneficiaries of that [31] fund. That is all. We are not asking that we be paid $17,000,000, or that we receive the proceeds of this fund. The purpose of this action is to ask the Court for an interpretation of this decision and a decision as to whether this fund should not be held as a trust fund and the claim, the unpaid amounts of these claims now paid by reason of the new obligation, not the old one, but the new obligation incurred when we turned over those tax credits.

The Court: Well, of course, if the Court determined that this was a trust fund to be held for the benefit of the creditors, you might have some further proceedings, in the matter. But there is no decision of the Court of Appeals that this was a trust fund. They never decided any such thing as that at all. All they decided was the plaintiff was not entitled to recover in the matter. One of the reasons that they gave for it was that there was no right in law for any recovery on the part of the plaintiff in the other action because its actions were the result not of any contractual situation that would entitle them to a recompense but was simply pursuant to some duty that existed on their part. That's all.

And that being so, that there was no cause of action in the complaint. And I don't see how—there is no decision of the Court here—I didn't read anything to the effect there was a trust fund, that the money recovered was a trust fund for the benefit of any creditors. It doesn't say so there. [32] And if it did, it would be the purest dictum because it

wasn't a matter that was before the Court for adjudication at all.

I see what your argument is, Mr. Goodrich, but I hope you will excuse me for asking you these questions and arguing with you. It helps me to understand, to see that I understand what you have in mind.

Mr. Goodrich: Well, I would like to make that position perfectly clear to your Honor because there is a marked distinction between the position of the Western Pacific Railroad Corporation as a stockholder in the preceding litigation and its position now. It has no right whatever—it did have no right according to the decision of the Court to participate in these tax savings because it was a stockholder or because it was the owner of the credit with the United States Government.

But the reason that Judge Byrne assigns why it could not as a stockholder and the owner of the credit obtain this $17,000,000 is that it was under a duty as a fiduciary to provide that money to the railroad company because the railroad company had unpaid creditors and those unpaid creditors could only be—couldn't include anybody else, whether we designate any of them as John Smith or by the true name—it could only be the three creditors that we have named in the complaint here. We brought the other two in simply for the purpose of making it perfectly clear to the Court the sole [33] purpose of this action, whether it was determined whether there is now under Judge Byrne's decision a trust obligation in that fund resting upon the railroad

company so that out of the fund so far as it may be possible to do it, the claims of those unsatisfied creditors may now be met.

The railroad company here has asked the railroad corporation be held in contempt of court. I might say, your Honor, I think you probably know that as a result of the terrific loss which it took in this bankruptcy proceeding and the loss of the stock, the Western Pacific Railroad Corporation is itself in the hands of a receiver in Delaware. Its affairs are in charge of the chancellor there; Mr. Alexis I. DuPont Bayard, who incidentally is a very eminent lawyer in the State of Delaware, is a receiver of the corporation. It was his judgment—it was the judgment of the attorney for the receiver, Mr. Marvel, Mr. Nicodemus, that here was at least a judicable question to be brought before this court as to whether this wording in that decision means just what it says. Perhaps it does not. But surely the receiver could not be in the position of neglecting any opportunity, if as a creditor the corporation was entitled to be paid out of this apparent trust fund, to seek the judgment of this court as to whether that interpretation is correct or not. I don't think that there is any contempt in the matter of that kind. As a matter of fact, this would not be, if our view of Judge Byrne's [34] decision is correct. This is not an obligation that would bar in any way by the final order of the Court. It would be in the nature of an obligation assumed by the railroad company under the Assumption Agreement here, because it would be a new agreement. We don't

appear before this court in contempt of the court, and certainly we are not asking this court to in any way violate the decisions that were made heretofore in this action. We can't do that. This plaintiff is here not to ask that the same remedy be given to it as a stockholder that was denied in the previous proceedings. We could not do that, your Honor, and would not do that.

But Judge Byrne says we had to make these tax credits available to this company for the purpose of saving these tax savings because it had creditors, and the railroad company itself advanced the identical argument in the initial proceedings, and, as I cited to your Honor, you made the comment that there seemed to be something in that contention.

Now, if we are correct, the railroad company here, it raises the, as it did in the preceding proceeding, the group of objections, they claim this is res judicata, they argue that there are laches and barred by the final order, and an examination of the final order would not reveal any such bar. They say the statutes of limitations apply. If our view of Judge Byrne's decision is correct and the consequences flowing from it, then a trust fund is created and the statutes of [35] limitations do not apply to that. A discharge in bankruptcy would not even apply to it. A discharge in bankruptcy is neither a payment nor an extinguishment of a debt, your Honor. It is merely a bar to the enforcement of the debt by legal proceedings. It neither destroys the debt nor supplants the moral obligation upon which the debt rests. The debt remains unpaid and in existence

after the discharge in bankruptcy so that security that is given for it may be available by the creditor, if he has any security, and if a new promise is made to pay the debt, that is a sufficient consideration.

Now a discharge in bankruptcy would not affect this matter as we are presenting it to the Court. Of course, the old claim is gone. That was wiped out by the decision in the 1946 proceedings, as I call them, the long period of litigation which ended in the confirmation of this Court's opinion. But this is a new claim which we are presenting to the Court, asking for its interpretation of Judge Byrne's decision, and when he says that we must turn over those tax savings because this railroad company had unpaid creditors, we can assume only that he means the unpaid pre-reorganization creditors in existence at that time, and that when they received the money it was in trust at least for the payment of the unpaid balance on those claims.

Whatever the residue that might be left, if any, afterward, that is a different question altogether. But here we [36] are presenting only the question of the correct interpretation of this decision and its effect on this fund which we can't help but feel if the Judge was correct that its basis is in the nature of a trust fund to be used for the satisfaction of the balance of these unpaid claims, it is a new thing, a new obligation created altogether, not an old one.

Are there any other questions, your Honor?

The Court: All right.

Mr. Matthew: May it please the Court, I think initially I should answer what counsel has said

about what he terms a construction or a determination in Judge Byrne's opinion. Your Honor will recall that two or three times counsel for the plaintiffs has referred to "unpaid creditors." Judge Byrne said nothing about "unpaid creditors."

May we go to that for just a moment? I have before me this little pamphlet which includes both your Honor's opinion and the opinion of the Court of Appeals, and I am turning to page 34 and page 35. First, I call your Honor's attention to the introductory sentence of the paragraph from which Mr. Goodrich has in part quoted. This is toward the bottom of page 34:

"However, it is contended that the subsidiary should have notified the Corporation's stockholders and directors of the filing of consolidated returns so that independent directors and officers could [37] have been put in charge of Corporation's interests to make a bargain with the subsidiaries and obtain compensation as a prerequisite to filing consolidated returns. There are several things wrong with this argument. The most obvious is that the entire transaction was open and above board."

From that point on, Judge Byrne proceeds to point out wherein the argument is wrong. He is replying to that particular argument and is disposing of it.

Now when he comes to the text, and which Mr. Goodrich did quote, and which is quoted in the complaint in this case, mentioned about line 6 on page 35:

"The Corporation was the sole owner of the sub-

sidiary's capital stock. As such it was under a duty to deal fairly with the subsidiary having full regard for the interests of the creditors and holders of other securities."

Nothing is said about "unpaid creditors." That is all I need to say there. That is the only sentence in which the word "creditors" is noted.

Certainly there is nothing in the text of this paragraph, nothing in Judge Byrne's opinion, which is susceptible of being translated into what my adversary has suggested, that Judge Byrne was holding or undertaking to hold that here a trust fund was created, was called into being, was in the [38] possession of this reorganized railroad company so-called trustee custodian, and which now must be paid over to the unpaid creditors. He said nothing about the "unpaid creditors" at all. He said nothing about a trust fund and there is nothing in what he has said that he imports that.

Counsel also called attention to the fact that Judge Byrne in what he said there was speaking largely in accordance with what your Honor said in your Honor's opinion. I think he is right in that. We go back to page 15 of this pamphlet where we have your Honor's opinion, and just below the middle of the page there is a sentence which Mr. Goodrich quoted. I will quote it again:

"Indeed there is some merit to defendant's contention that a firm obligation rested upon plaintiff to conform and co-operate to the end that the creditors and new owners should be benefited to the fullest."

That I think is a little more correct statement of just what Judge Byrne had in mind and what he was saying was merely an approval of what this court had said, and indeed there is no reference to "unpaid creditors." They speak of "creditors" and of "new owners" and the new owners are largely the old creditors which were allowed to participate in the Plan.

There are obviously three things wrong with that particular contention on the part of our adversaries. In the first place, [39] Judge Byrne did not say what apparently has been attributed to him. He said nothing suggesting that a trust fund had come into existence to satisfy the unpaid creditors. Nothing whatever.

The second is that Judge Byrne—I should rather say, the Court of Appeals did not purport to make findings of its own. It could not do so. What it did actually was to approve the findings of this court without modification at all.

And third and finally, the judgment of this court was affirmed and without the slightest modification.

I have handed to the Court and counsel a copy of that judgment, so there will be no question about it. This amended judgment, second paragraph, recites:

"It is by the Court Ordered, Adjudged and Decreed that the plaintiffs, The Western Pacific Railroad Corporation and Alexis I. duP. Bayard, Receiver, be denied all relief, and that the interveners be denied all relief, and that the plaintiffs recover

nothing and that the interveners recover nothing from the defendants or any of them."

That they receive nothing. That's the judgment. They receive nothing. That should dispose of the contention predicated upon what counsel has termed Judge Byrne's decision.

It is not a decision. It is really a statement of the [40] course of reason and does not have the effect that counsel seeks to attribute to it and, of course, it could not have that effect.

Counsel finally observed in the course of his argument, and I think I can almost quote this directly, he said: There is a marked distinction between the status of the Western Railroad Corporation as a stockholder and its status as a creditor. That's about his language. Then he went on to say: Of course, the Western Pacific Railroad Corporation was bound by the results reached in the suit before your Honor in which it was held that the corporation and the receiver should take nothing.

But he says that simply concluded it as a stockholder and they still have a claim as a creditor.

Assume that is true for the moment. But, as your Honor pointed out in the inquiries which came from the bench this morning, what was his status as a creditor? Was it an antecedent creditor? It was such an antecedent creditor and is bringing this suit here for the purpose of recovering some seven millions of dollars and more upon a claim which is at least eighteen years of age and more because it was based upon an indebtedness incurred prior to the petition for reorganization on August 2, 1935,

and that will have its nineteenth birthday in August of this year.

Now only so, but that claim was held valueless in the [41] reorganization proceeding. It was ordered cancelled and discharged, it was cancelled and discharged, it has been dead and buried for some ten years and it is beyond the possibility of resurrection now, and being made the basis of this suit.

In order there can be no possible misunderstanding as to the status of that claim, and I repeat it was an antecedent claim, I have excerpted from the order of the Interstate Commerce Commission prescribing this reorganization plan, what the Commission said both about this claim of the Western Pacific Railroad Corporation as a stockholder and its claim as a creditor, and a copy has been handed to your Honor, this single sheet, and a copy has been handed to counsel.

On it, and from it we can see whether the claim is really any different.

First, under subdivision P, paragraph 6—I am now quoting:

"The unsecured claims of the Western Pacific Railroad Corporation and the Western Realty Company, and other unsecured claims not entitled to priority over existing mortgages, are found to be without value, and no securities or cash shall be distributed under the Plan in respect of these claims."

So the claim is held to be without value.

Now we proceed to subdivision R, which reads as follows: [42]

"The capital stock of the debtor and the unsecured claims against the debtor not entitled to priority over existing mortgages shall be cancelled."

So the stock was held valueless, and the Western Pacific claim as a creditor was held valueless. The claim was ordered to be cancelled, and it was cancelled.

Now the reorganization proceeding, which lasted over ten years, that reorganization plan, as your Honor knows, was approved in the first instance by order of Judge St. Sure sitting in the proceeding. There was an appeal. The Court of Appeals reversed and the Supreme Court granted certiorari. In March of 1943 the Supreme Court reversed the Circuit Court and approved the order made by the District Court upholding the plan.

That plan, as I have stated to your Honor and made clear by this little excerpt, held the corporation's claim valueless and ordered it cancelled, and the Supreme Court approved it.

In the fall of that same year, the District Court again, through Judge St. Sure, made an order confirming the plan and no appeal was taken of that order. That should be enough.

When that plan was confirmed as the plan that should be submitted to the creditors which actually was accepted and finally consummated, that was the end of that claim because [43] it was held valueless in that reorganization proceeding.

Now that isn't all. I don't know how far your Honor will expect me to carry this. But we pass along to the time Judge St. Sure made his revest-

ment order, which I think was in the fall of 1944. That order was made November 27, 1944:

"Order directing the revesting of properties of the debtor in the reorganization company free and clear of all claims except such as have been specifically approved * * *"

Now this order included the requirement that the reorganization committee execute an assumption agreement did not require the assumption of prereorganized claims, such as this, against the debtor company or of unsecured claims which were cancelled and discharged. On the contrary, it expressly withheld authority to pay such unsecured claims. And I come to that now, although probably is isn't necessary, but since I have purported to rely upon the assumption agreement to pass upon this supposed liability to the reorganized company, the Court should know that was not the purpose or intent of the assumption agreement but was expressly forbidden by the order of the Court itself. That proviso reads as follows:

"* * * provided, however, that this order shall not be construed as a modification of any former orders of this court barring or settling [44] claims against the debtor or the debtor's Trustees, and said Railroad Company shall assume only the valid and outstanding obligations and liabilities of the debtor or the debtor's Trustees, other than unsecured claims against the debtor not entitled to priority over existing mortgages, which unsecured claims are hereby cancelled and discharged, and only such obligations and liabilities as are preserved under the plan of reorganization and are not limited

or discharged by the prior orders of this court."

So as of that it is perfectly clear now only that this claim of $7,000,000 which the railroad corporation is now attempting to make the subject of this suit, this new suit, that claim has been dead and buried so long that I am at a loss to understand how even my rather persistent friend on the opposition can see any occasion for attempting to bring suit upon it. The claim has not only been discharged but I say has been interned so long that it cannot be resurrected for any purpose.

The difficulty with my adversary's case is this—it is directed to two objectives, neither of which is possible of attainment. The first is to recover upon this antecedent claim of the Western Pacific Railroad Corporation against the old debtor company, which was cancelled and discharged in the reorganization proceeding. Now that is impossible and yet that [45] is frankly avowed in the complaint, and they say, because they are intrigued by what Judge Byrne said, in that opinion they find some kind of a trust fund and then and therefore that trust fund is now available to satisfy the unpaid claims of antecedent creditors even though those claims have been wiped out. I can't follow that line of reasoning at all. That is not the effect of a proceeding in bankruptcy.

In that connection, I would like just briefly to bring to your Honor's attention something that was said in your Honor's opinion which I think effectively disposes of at least a large part of my adversary's argument. This is on page 15 of this little

pamphlet, with the brown cover—I will read just one paragraph, if I may, the last paragraph on the page—page 14:

"When it was finally determined, after running the full gamut of court and administrative procedure, in the reorganization of the Western Pacific Railroad Company, that the plaintiff's interest was worthless, nothing short of some extraordinary cause justifying reopening the reorganization proceeding could effect a change. To make any award in this cause, under the assumed authority of equity principles, would be in effect to modify the administrative and judicial judgments in the reorganization proceeding. Such a procedure would be an indirect nullification of the purpose of the [46] reorganization statute, in the guise of an afterthought allegedly of equitable persuasion."

Your Honor was there addressing himself to the claim of these so-called tax savings in the suit which was before your Honor for so long. But that language is equally pertinent to the claim of this Western Pacific Railroad Corporation as a creditor, particularly when that claim has been held valueless and has been in fact cancelled and discharged.

I have said that the first objective is impossible of attainment because the decrees in the reorganization proceeding prevent it and in fact forbid it. Now the second objective is to obtain something in the nature of a retrial of the so-called tax savings case. [47]

It is difficult for me to understand how counsel can concede, as he did this morning, that the Cor-

poration and the Receiver are precluded by the Decision in that case as he has said, and yet to declare in the Return to this Order to Show Cause that is essentially an identical action.

I know your Honor has before him the Respondents' Return to the Order to Show Cause. It is a sheet of paper only. I wish to deal with it a little more fully a little later on.

I refer at the moment to the second paragraph that reads as follows:

"Said successoral action was brought by respondents to implement a determination of the Court of Appeals in the Ninth Circuit in an earlier and substantially identical action brought by them under said Assumption Agreement, by providing a machinery or medium for the administration of a trust resulting therefrom in respect of a fund of $17,-201,739 in the custody of the defendant Railroad Company but held by it subject to all of its obligations under said Assumption Agreement."

To my mind that is a very curious representation. That fund of $17,201,739 will be familiar to your Honor. That is the rotund sum which our adversaries were sueing in the tax litigation case, the so-called tax saving. And here it is [48] recited in this Return that that is a "substantially identical action" with the present action.

Well, if these two actions are substantially identical, it would seem basically clear that the judgment entered by your Honor in that case and which was approved by the Circuit Court of Appeals and which the Supreme Court of the United States refused to

disturb res judicata respecting all issues raised in that substantially identical action.

I will come back to this a little later. Perhaps as long as we have come to it, I will deal with it a little further, if your Honor please, because I am thoroughly dissatisfied with this Return. It is not responsive by any means to our petition for Order to Show Cause. I think it is highly misleading.

Now, the first paragraph is as follows:

"The successoral action commenced by the respondents in this Court being Civil Action No. 33514, was brought against the defendant Western Pacific Railroad Company under the Assumption Agreement executed by the defendant Western Pacific Railroad Company as required by said final order to enforce a valid and subsisting liability of the reorganization Trustees which was transferred to the reorganized Western Pacific Railroad Company; and it is an [49] excepted action provided for and contemplated by said final decree of March 28, 1948, and in no respects violative thereof."

Well, if your Honor please, I think counsel defined it very clearly to your Honor that this is an effort to recover upon that antecedent claim, the claim of the corporation as a creditor against the old debtor company.

That claim never became a liability of the reorganization trustees, and could not have become a debt of the reorganization trustees. It could not have been carried forward and imposed upon the reorganized company. The Assumption Agreement did not require the reorganized company to assume

these antecedent claims against the old debtor company.

On the contrary, I point out to your Honor that the order of Court forbade that, and yet it is set forth in that first paragraph of this Return, that this was brought upon a claim to enforce a valid and subsisting liability of the reorganization trustees.

I submit to your Honor that that representation is not in conformity with what is in the complaint itself.

I refer to the second paragraph. As regards the first paragraph, I think I need say nothing about that or about what counsel has stated to your Honor in that connection, beyond this, that it does not appear, so far as I know, that the Chancery Court in Delaware specifically authorized the [50] institution of this particular complaint. Nothing was shown that it has. I assume that in making this Return upon what is based the general authority of the Chancery Court, that is not a matter of moment in any event.

If an action is brought which is in fact contemptuous, it is contempt no matter upon whose order it is in this Court.

I think I have said enough about the reorganization proceeding which, as I have told your Honor was brought to a conclusion by the final order of March 28, 1946. I did refer to the injunctive proceedings in the prior revestment order, but the final order contains injunctive positions just as distinct, and I am quoting briefly from paragraph six of this

final order, and a copy of that has been handed to your Honor and likewise pleaded in our petition. These are injunctive provisions which prohibited the institution of suit against the reorganized company, and I am quoting:

"* * * on account of or based upon any right, claims, or interest of any kind or nature whatsoever which any such persons, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court), * * *"

Certainly suit upon this claim which was an antecedent [51] claim which existed before August 2, 1944—was certainly a claim effected on or before August 2, 1944, and the injunctive proceedings forbid the institution of this suit.

I can say little more, I think, respecting what was set forth in our petition for an Order to Show Cause why the Western Pacific Railroad Corporation and the Receiver should not be adjudged guilty of contempt for instituting this suit which was directly in conflict with the injunctive provisions which I just brought to the attention of the Court.

I intended to say something more than now appears to be necessary respecting the tax saving suit, as it has been called. Your Honor is thoroughly familiar with it. That litigation carried over more than seven years. Your Honor knows there was a protracted trial here. Your Honor is familiar with the judgment entered. The Circuit Court affirmed it. The Supreme Court refused to disturb it, and

ever since that time that judgment has been final. It is beyond challenge anywhere and it is res judicata of any claim directed to the revenue of the trustees, so-called tax savings, which is the subject of the complaint in that proceeding.

The filing of this complaint is a strange act of these two prolonged pieces of litigation in the reorganization proceeding and before your Honor. I intended or I would be tempted to review that bill of complaint rather fully but I [52] gather your Honor has read it and I think I need not say more than has already been developed in connection with it.

The only thing that is new in that complaint at all is the attempted use of those few sentences in Judge Byrne's Opinion, with the extraordinary contention of my adversary—importing the "unpaid" continuously—that it is in his behalf a ruling that a trust fund has been created which now may be used in part at least to pay off claims eighteen years old or more which were held valueless and which were ordered cancelled and discharged in the reorganization proceeding. [53]

When a claim is cancelled and discharged, it is through. I don't know whether I have to say that any more than I have said it. But it is beyond my ability to understand how our adversaries can now come before this court and sue upon a claim which was held valueless in the reorganization proceeding and which by order of court itself was required to be released and cancelled and discharged.

When a claim is cancelled, discharged, it doesn't

exist any longer. And that is one of the objectives of this suit. But one would never guess that objective is in this suit upon reading the return. Nothing whatever is said about this suit to recover this $7,000,000 on the old pre-reorganized claim against the debtor company.

What the architect of this extraordinary complaint has undertaken to do is to try to put two things together. But neither, as I said before, can be accomplished and neither supports the other. It is an attempted retrial of the tax savings suit beyond any question. They so state in their return, and beyond question they attempt to find something in Judge Byrne's opinion in the tax savings case which, as they view it, will enable them to revise that ancient claim and now get some money. I submit to your Honor that is simply impossible.

I don't know what counsel expects to gain by quoting from the letter addressed by the receiver to the Western [54] Pacific Railroad Corporation in advance of bringing this litigation, on page 14. I don't know as I need to comment upon it. I think merely an announcement to the effect that if the Supreme Court should refuse to give the corporation the relief it sought by the second petition of certiorari then there is intention to bring some kind of an action out here in the bankruptcy court, that to my mind is meaningless. It is just an announcement that this vexatious litigation will continue, and nothing more.

I think I have probably said enough respecting both what took place in the reorganization proceed-

ing and what took place in what we call the tax savings suit before your Honor.

There can be no question at all that the order, the judgment, the decrees in those three litigations, in those two pieces of litigation, are final and conclusive. Now here we are after the reorganization proceeding, already a period of ten years. We got through it. And the litigation which was started before your Honor required seven years before we were through with that. There must come a time when litigation should come to an end. And this litigation should now come to an end without a resumption of this harassing litigation.

There is something I went to say in response to counsel's plea that the institution of this suit should not be deemed contemptuous. Plainly it is contemptuous and our memorandum of authorities I think makes that very clear to your Honor. [55] We have reproduced in that memorandum of authorities a copy of the order made by Judge St. Sure in another contempt proceeding, the same counsel being opposed. If your Honor will have that in mind. That is a memorandum of authorities in the contempt matter. It is on page 2 of the memorandum, which I think is at the bottom of my file. I take it your Honor has it.

This is Judge St. Sure's order, and I am referring to paragraph (f) on page 2, which I now read:

"The Court, being fully advised, finds * * * that in and by said action The Western Pacific Railroad Corporation has asserted and now asserts a claim against the petitioner which, if it exists at all, ex-

isted on and before December 28, 1944, and was released and discharged by said Final Order; that the assertion of such a claim was and is barred and enjoined by said Final Order; and that the commencement of said action is not and has not been provided for or permitted by any order of this court."

In that case, as here, The Western Pacific Railroad Corporation was attempting to sue the reorganized Western Pacific Railroad Company upon a claim which, in the language of Judge St. Sure and in the language of his order, existed on or before December 28, 1944. Therefore, the suit was contemptuous, and the court so held. [56]

I argue the respondent should be adjudged guilty of contempt, and knowingly so guilty. Having said that, I believe it to be my duty to afford justification.

In the first place, New York counsel for The Western Pacific Railroad Corporation participated throughout the reorganization proceeding. He is familiar with all that took place there and obviously cognizant of all of the orders—obviously and properly brought to his attention. He was therefore fully advised respecting the orders of the reorganization court and fully advised in particular respecting the orders which cancelled the claim of the corporation ordering it discharged and forbade the institution of suit upon that as well as prior claims of similar character. That is the first thing.

Now, secondly, we come back again to the Sacramento Northern Railway proceeding in which Judge

St. Sure held that the suit then brought by the corporation was contemptuous. Your Honor will recall that some time later the corporation filed its petition in the bankruptcy proceeding for what was called a modification or clarification of that general order with a view to permitting the corporation to reinstitute that suit, a new suit upon the same ground. It came before your Honor as successor to Judge St. Sure in the bankruptcy proceeding. The petition that was filed has not a little significance, and I am talking now about the petition that [57] was filed on the part of the corporation and dated August 18, 1947, in behalf of the railroad corporation by LeRoy R. Goodrich and Frank C. Nicodemus, Jr., of counsel. I am quoting from pragraph 9, and the purpose is to make clear to the Court what counsel then knew and understood as to what these injunctive proceedings meant. I am now quoting:

"The petitioner further represents that the true intent and purpose of the final order of March 28, 1946, was to prevent the reassertion of claims against the debtor railroad corporation which existed at the date the debtor's properties were placed into judicial custody, August 2, 1935, and which were cut off or intended to be cut off by the plan or reorganization as of its effective date, January 1, 1939."

Now here I interrupt the quotation for a moment because I wish to emphasize what is there said by opposing counsel, same counsel opposing us here, that the intent of that final order was to cut off

claims which existed on August 2, 1935, to prevent the reassertion of those claims, as I already read.

Now the sentence continues, and I continue with it for just the sake of completing it, although it is not pertinent to the instant matter:

"And it was not intended to cut off valid and subsisting claims against the trustees created [58] by or resulting from business transacted by and with the trustees during the period of judicial operation and administration."

In short, this Court did not by its order of March 28, 1946, intend to repudiate any of its own obligations or what was tantamount there to the obligation to the trustees.

As counsel recognize and declare, the purpose of the opinion of the injunctive provision was to forbid the reassertion of claims which existed before August 2, 1935, which were intended to be cut off by the order but was contending that the particular case he had represented a claim against the reorganization trustees. The Court thought otherwise. But that is the claim, that is the distinction.

As I was saying, if counsel for the corporation understood on August 18, 1947, when they filed their petition with your Honor that such was the purpose and the effect of those injunctive provisions, they must have had the same understanding as to their meaning when they filed this new bill of complaint in April of this year.

Court orders are to be obeyed. When a court order has knowingly been disobeyed, judgment of contempt and appropriate disciplinary measures

should follow as a course, and I think it is necessary to the vindication and enforcement of the court's jurisdiction, and otherwise there is never an end of litigation, notwithstanding an injunction forbids that [59] litigation.

I think, if your Honor please, I need not take up separately now our motion for a summary judgment. In effect, I think everything that is germaine to that has already been developed in the course of argument. That motion is rested upon conventional rules of court in the first instance. There is no genuine issue of fact, and there is none. I have filed our motion for summary judgment, and we rest that motion for summary judgment fundamentally upon two very simple matters. First, the final judgment and the decrees in the reorganization proceeding, which not only had annulled this particular claim of the corporation to its antecedent advancements to the old debtor company, that suit upon it, but brought the whole proceeding to an end. That has been dead, as I say, for all these years.

And, second, we rely upon your Honor's judgment in the tax saving case which was confirmed by the Court of Appeals, not disturbed by the Supreme Court, as a final judgment which is res judicata of all issues raised in that proceeding or which could have been raised in connection with that litigation.

Those two cases, the results of those two cases, afford a complete bar to the action here being attempted in this proceeding.

Now I will say just one thing more, if your Honor please. I think I have already suggested it, and I

would like to suggest [60] it once more. There must come a time when we can be through with litigation, and that time we feel has been reached here. The reorganization proceeding was more than ten years, and a good many, many years have passed since that was closed, the final order in 1946—eight years, the litigation before your Honor took more than seven years. There can be no question that the judgments, orders, whatever took place in those two proceedings, are final and that they are res judicata in all aspects, and we think this further hearing is merely intolerable.

If there are any inquiries from your Honor, I will be glad to answer them. But I think that I need not cover the ground that I have marked off for possible discussion. It seems to me the issues are now quite clear.

Mr. Goodrich: Your Honor, first I will refer to counsel's statement with regard to the expression used by Judge Byrne in his decision and the argument which he says I made upon it. I certainly would not insert or omit a word in quoting from any decision of any judge before this or any other court. I think what I did in reference to the decision of Judge Byrne was to read precisely as Mr. Matthew has read certain sentences from that decision and the sentence in which—the two sentences in which the word "creditors" appears. They are these; speaking of the fact that the corporation was the sole owner of the subsidiary capital stock, the Judge says:

"As such it was under a duty to deal fairly [61]

with the subsidiary having full regard for the interests of the creditors and holders of other securities * * * It owed a duty not to require its subsidiary to forego a legitimate tax saving and could not bargain to perform its duty."

And in the next paragraph he again uses the same word, "creditors"—in this fashion—he says:

"If Corporation had required tribute as a condition of its co-operation, then it would have been acting with less than the required standard of fairness to the subsidiary's creditors."

Now, that is exactly the same as I read both of those sentences before. It is true, I think, that in the course of the discussion of the possible effect of that decision I spoke of these three creditors as the "unpaid creditors." But surely the distinction between the one and the other is perfectly obvious and I think Mr. Matthew is wrong in implying that I in any fashion distorted the language of the Judge. The Judge was speaking of the fact that we were required to make this tax credit available to the railroad company, as he puts it—to make sure that we will have it now—because we had to deal fairly with the company "having full regard for the interests of the creditors and holders of other securities," and he said that if we had not done so we would not have been acting with "the required standard of fairness to the subsidiary's [62] creditors."

Well, of course, the only creditors who had not been fully paid were these creditors, and that is why in discussing Judge Byrne's statement I referred

to them as the "unpaid creditors." It is perfectly correct, the Judge did not use the word "unpaid." I used the word "unpaid." Because it is the only way in which we could possibly determine what the Judge's statement meant.

If a creditor has been paid in the course of a bankruptcy proceeding, it seems to me he ceases to be a creditor at all, for the simple reason that payment wipes out the debt in full. If in a bankruptcy proceeding the creditor is not paid for the reason that there are not assets enough to make it possible to pay him at all, then his claim, while it may be valueless in the sense that there are no present assets to pay it, his claim is still a claim, the debt is still a debt. Even a discharge in bankruptcy does not discharge the debt, and, as I have cited to your Honor, and although I need not supply the authorities—every attorney knows—that subsequent to the discharge in bankruptcy a new promise will make that debt good again and serve the purpose of reviving it; or I can offer to give "A" some money, provided he will pay it to "B" who was his creditor; even though the debt has been wiped out in bankruptcy and I provide the money, I think then "A" is under obligation to pay it to "B."

The Court: At least good to the extent that the creditor [63] can't sue you for it any more.

Mr. Goodrich: That's right. It just means that the creditor as a creditor can't sue.

All right. Now——

The Court: Well, don't you think it is just as reasonable an interpretation of Judge Byrne's state-

ment that the corporation owed this duty whether they are creditors or not?

Mr. Goodrich: That what?

The Court: Isn't it a reasonable interpretation of what Judge Byrne was saying that the holding company would have had this obligation to do this whether they were creditors or not? They might have had the obligation on the ground that the holding company could make more money, the operating company could make more money. It isn't necessarily an obligation that solely arose for the benefit of the creditors.

Mr. Goodrich: We don't find any such statement in the decision.

The Court: The reason Judge Byrne puts it that way is because this happened during the reorganization, that's all. That is a——

Mr. Goodrich: In any event, your Honor, let me make it perfectly clear that what we have attempted to do here is simply seek here from this court an interpretation which the receiver has felt that he was entitled to have of the effect of this decision of Judge Byrne's. [64]

The Court: Don't you think that was a little presumptuous of this receiver in Delaware to ask the District Court, by filing another suit, to interpret the opinion of the Circuit Court of Appeals?

Mr. Goodrich: Well, I don't know. If the decision means what it appears to mean, then it would appear that Judge Byrne felt that this money, when paid over would be paid over because there were creditors whose claims had not been satisfied.

The Court: I never have heard in my experience of the District Court being asked to interpret what the Circuit Court said when it decided a case as to the meaning of some of its language in a case. It is true that we cite sometimes decisions for what comfort we get out of some language in them—sometimes they are applicable, sometimes they are only dictum. I don't quite see the basis of the thinking of the receiver in Delaware who asks this court to—who files this suit to recover some money and calls that a proceeding to ask the court to interpret the language of the Circuit Court.

Mr. Goodrich: At least it seemed clear, I think, to the receiver, that the effect of Judge Byrne's decision was, as we have set it forth here, that his intention was to say that our obligation was created by the fact that there were creditors who were entitled to have this fund made available to the railroad company. Now if the receiver's view, the [65] view of the corporation with regard to that decision is correct, if that is what Judge Byrne's statement meant, and that's the import and force of it, then obviously there would be upon the receipt of the money from those tax credits a trust relationship established on the part of the railroad company to so do. Otherwise, it would seem that the words that are used mean nothing. If you say, as it says here, that if we had not done so we would not have been acting fairly to the subsidiary's creditors, and that we couldn't bargain, couldn't even make any arrangement with them of any fashion with regard to this fund. We had to deal fairly, it says, with

the subsidiary, having full regard for the interests of creditors and holders, and that seems to mean that they simply have to turn the entire fund over to the railroad company because there were creditors.

Well, the only creditors that we may have, of course, would be the unpaid creditors, and from that it would seem to flow that these creditors now had a right to ask the court to, under the force of this decision, to regard this as a trust fund from which they would be reimbursed.

That is not an action on the original claim. I agree with Mr. Matthew that the original claim as a claim in bankruptcy is dead. A claim presented to the bankruptcy court after a discharge in bankruptcy, the claim is dead. But——

The Court: Well, if it is dead, what difference does it make if there was a trust fund? [66]

Mr. Goodrich: The obligation still persists according to the authorities. All that is wiped out is the right of the debtor to sue on that claim and that is——

The Court: Well, all right. How can you sue on the claim if the claim is dead?

Mr. Goodrich: We can't sue on the claim.

The Court: Isn't that what you are doing? You are suing the railroad, you are suing the defendant here on the claim.

Mr. Goodrich: We sue on the claim as a matter of law, if it were a good claim and we could sue on it. We can't do that——

The Court: Suppose I have got a claim against

But I think there are some filed here—aren't there, already?

Mr. Nicodemus: No, I think we have filed—I would like to file a brief memorandum.

The Court: What parts are there that you wish to raise in addition to what has been argued here today?

Mr. Matthew: If your Honor please, I submit that counsel has had ample time to file his memorandum here. He should have done it before.

The Court: I don't think there should be any particular delay in this matter, unless there is some purpose to be served by it or some point that is to be urged that has not been covered. [69]

I will say very frankly in my opinion there doesn't appear to be the slightest merit to this proceeding at all and that it ought to be dealt with as a contempt of the restraining order that was issued and that appropriate expenses should be allowed. I just don't think that there is the slightest merit to it. I have listened patiently to the arguments. There hasn't been anything said that gives any basis for this suit.

Now, if there are some additional legal points that have not been presented, why, it is kind of late for me to hear them now. I don't want to be arbitrary about the matter, but we have got a lot of matters in this court that have to be given attention. I have listened for an hour this morning to this matter—two hours, rather. I have read the pleadings in the case, and I don't want to be curt or cruel about the matter, but there just doesn't appear to me to be

the slightest merit in the suit. There is just nothing in it at all. To bring an action in this court on the basis of some few words that a judge said in another proceeding as some of his reasons for deciding the case the way he did decide it, as the basis for taking up the time of the court with new litigation over the very same matter, just does not seem to me to have any—to require too much attention on the part of the Court.

Sometimes we overlook some things, but if this were some simple piece of litigation in which the same thing were done and all of the eminent counsel had been involved were not [70] involved, and it was a suit over somebody slipping on a doorstep, the court wouldn't give very much time or consideration to as specious a claim as this is.

There hasn't been anything said to me here this morning—I don't want to be too, as I say, emphatic about it; there isn't anything that has been said that gives the slightest basis to the suit whatsoever. There is just nothing in it at all. And I suspect—although I shouldn't say this—there may be some hope that somebody might be willing to pay something for avoiding a long-drawn-out litigation.

I think this motion for summary judgment of the defendant should be granted. I think an order of contempt should be made, and I think you ought to be required to pay the expenses and counsel fees that have been required of defendant to defend the matter.

I don't think you can just go on pursuing litiga-

tion under circumstances of this kind without it being and affront to the judicial processes.

Now, counsel, if there is some legal point that has been overlooked upon which you want to file a memorandum and you want to point that out, why, I shall allow further time, if you wish, to have a rehearing in the matter, but just to have a rehash of what has been said here today, I don't see any reason for it.

I say, if there is some additional legal point that has [71] been overlooked.

Mr. Nicodemus: I would like to file a memorandum on the effect of the decree which is the basis of the order to show cause. I don't think we were within the scope of the injunctive provision of that decree. I would like to elaborate that, and that is quite fundamental. I can do it within the week, if you will give me that much time.

Mr. Matthew: If your Honor please, counsel has had ample opportunity to file that memorandum before this. When we submitted our petition and the motion was served upon him, with our memorandum of points and authorities, it was very specific, he had a chance at that time in making his return to file his memorandum of points and authorities. He didn't do it at all. There is nothing here at all——

The Court: All I am trying to find out, Mr. Matthew, is if there is some point in addition to what has been argued here. Now, what do you mean when you say you want to file a memorandum as to the effect of the decree? If you will tell me something that constitutes some cause or reason for it—I

don't like to deny any counsel the opportunity to file that memorandum—I just don't know what the reference is to.

Mr. Goodrich: If your Honor please, Mr. Nicodemus has said he is having trouble talking and he says that what he has in mind is to file a memorandum with regard to the force of the decree and the fact that this is not within the scope of [72] the prohibitive matters in the decree.

I think—if I understand you correctly (to counsel).

The Court: Do you know what his point is?

Mr. Goodrich: No, I do not, your Honor. I have not had any opportunity to discuss it with him.

And, as far as the memorandum is concerned, I think Mr. Matthew will realize, while I represent the Western Pacific Railroad Corporation here, Mr. Nicodemus and Mr. Marvel, the attorneys for the receiver, are in the east, and following the receipt of the petition for an order to show cause why we shouldn't be held in contempt—rather, the corporation—I communicated that properly to them, but we had only a limited number of days within which to prepare any memorandum at all.

The Court: Mr. Goodrich, I prefer to look a little bit more—in this I don't mean any criticism—I prefer to look a little bit more to you with respect to this matter. I intend to make an order along the lines I have stated here today. I will hold it up for five days, and if you have anything further, after consideration of the matter, that you wish to—that you feel is any different and that you wish to sub-

mit to the Court, do it within that time, and you can confer with counsel in that regard.

Mr. Goodrich: I will be glad to do that, and I will either file it or advise your Honor that it will not be filed.

The Court: I will formally mark the matter submitted, [73] but counsel are aware of what the Court's intentions are in regard to making an order, but I will hold it up for—if you wish—time isn't so important—let's say ten days.

Mr. Goodrich: That will give Mr. Nicodemus a chance to return east and prepare his memorandum.

(Matter submitted.)

[Endorsed]: Filed September 7, 1954. [73-A]